UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUBREGION 26

In the Matter of: **PHILIPS ELECTRONICS NORTH AMERICA CORPORATION**, Respondent, and **LEE CRAFT**, **AN INDIVIDUAL,** Charging Party.	Case No. **26-CA-085613**

ANSWERING BRIEF OF RESPONDENT IN OPPOSITION TO EXCEPTIONS FILED BY COUNSEL FOR THE ACTING GENERAL COUNSEL TO DECISION OF ADMINISTRATIVE LAW JUDGE

National Labor Relations Board

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STATEMENT OF THE CASE

Respondent Philips Electronics North America ("Respondent," "Philips" or "Company"), submits this Answering Brief to Acting Counsel for the General Counsel's Exceptions to the Decision of the Honorable Margaret G. Brakebusch, ALJ. The Counsel for the Acting General Counsel ("General Counsel") filed exceptions to nineteen of the ALJ's findings; but, mostly, the General Counsel takes exception with the ALJ credibility findings. In any event, each of the exceptions should be rejected because the evidence and applicable Board law supports the ALJ's findings.

THE ALLEGED UNFAIR LABOR PRACTICE

On November 30, 2012, the Region issued a Complaint which alleges that "[s]ince January 19, 2012, Respondent has maintained a rule that discipline is confidential and prohibiting employees from sharing and/or discussing their discipline with their coworkers." The Complaint further alleges that "Lee Craft showed and discussed with his coworkers an employee counseling form he received from Respondent on about January 20, 2012" and that "[a]bout January 25, 2012, Respondent discharged its employee Lee Craft" because he shared and/or discussed his Final Written Warning with his coworkers. (GC-1(e)).[1]

[1] The record consists of the transcript of the hearing conducted on March 11-12, 2013 ("Tr."), Respondent Exhibits ("R") and General Counsel Exhibits ("GC"). Herein, the Decision of the ALJ is cited to as "ALJD."

DECISION OF THE ALJ

The ALJ conducted a hearing on March 11 and 12, 2013, addressing the charge by Lee Craft ("Mr. Craft") that Respondent violated Section 8(a)(1) of the Act by terminating him. The ALJ found that during the hearing General Counsel failed to establish that Respondent has maintained a rule that discipline is confidential and employees are prohibited from sharing and/or discussing their discipline with their coworkers. The ALJ also found that General Counsel established a *prima facie* case under *Wright Line*. Then, the ALJ properly found that Philips established that it would have terminated Mr. Craft even in the absence any protected activity. In this regard, significantly, the ALJ recognized that the management team had decided to terminate before he allegedly engaged in protected activity. That is, upon completing its investigation of co-worker Kim Coleman's December 2011 complaint about Mr. Craft, management decided to terminate Mr. Craft's employment based on his harassment, intimidation, and/or bullying of his co-workers, as well as his poor job performance and generally disruptive behavior. The ALJ also recognized that, upon further review, management decided to give Mr. Craft one last chance and instead of issuing the previously drafted termination notice, Mr. Craft was issued a Final Written Warning on January 20, 2012. Thus, the ALJ found that management decided to terminate Mr. Craft before/absent the alleged protected activity. (ALJD 13:15-14:22).

Ultimately, the ALJ found that the final decision to terminate Mr. Craft, which was made several days later and after he allegedly engaged in protected activity, was

based on essentially the same reasons as the prior decision to terminate – with the final act of harassment/intimidation/bullying and disruptive behavior occurring on January 24, 2012 when Mr. Craft left his new work area during work time and drove a company vehicle approximately 150 yards to continue the harassment of Ms. Coleman -- whom he had been moved away from based on prior harassment and instructed not to contact. The ALJ found that on that day, Mr. Craft engaged in acts which were reasonably perceived by Ms. Coleman as continued harassment, including that Ms. Coleman was to blame for his receiving the Final Written Warning and his transfer. The ALJ found that this behavior provided the Company with legitimate non-discriminatory, business reasons to terminate Mr. Craft's employment – separate and apart from his alleged protected concerted activity. (ALJD 14:24-16:4).

STATEMENT OF RELEVANT FACTS

Background

Respondent Philips Lighting Company is a division of Philips Electronics North America Corporation, which is a corporation organized under the laws of the State of Delaware. The Philips Southeast Regional Distribution Center located at 3399 East Raines Road, Memphis, Tennessee serves as a distribution center for Philips Lighting products. (ALJD 2:14-26; GC-1(a)-(k); see also Tr. 174:22–176:13).

Philips does not have a written or un-written policy which prohibits employees from discussing disciplinary notices, and the Company has not disciplined anyone else for discussing such notices. Mr. Craft testified that there was no policy and that no one at Philips ever told him that he could not discuss his disciplinary notices. General Counsel

did not produce a single witness to say there was, or even that they believed there was, such a Philips policy. (ALJD 9:40-11:19; GC-2; Tr. 171:6-174:7; 126:21-128:5).

In or about February 2003, Mr. Craft was hired at the Philips Memphis facility as a material handler and for the first few years he was generally meeting expectations. In or about April 2010, Sherry McMurrian, Distribution Center ("DC") Manager--alleged wrongdoer--promoted Mr. Craft to the position of team lead, where he was supposed to lead other material handlers. Initially, Mr. Craft reported to a male manager, Gene Blinstrup, DC Supervisor, who according to several witnesses generally did not expect much from his team leads, and, in fact, did most of their work. (ALJD 2:32-3:2; Tr. 174:8-21; 176:14-178:2; 437:5-23).

In or about October 2010, after Mr. Blinstrup retired, Rolita Turner ("Ms. Turner") was promoted from a team lead into the position of DC Supervisor. By all accounts, Ms. Turner expected more than Mr. Blinstrup from the Mr. Craft and the other team leads.[2] (Tr. 431:21-432:1; 437:5-23). In this regard, Mr. Craft's job performance as a lead was not meeting the expectations of Ms. Turner and Ms. McMurrian. (Tr. 435:7-438:18). Indeed, in early 2011, Mr. Craft received a Performance Evaluation from Ms. Turner and Ms. McMurrian wherein he received an overall evaluation of "Improvement Needed." (R-1; Tr. 178:8-180:25; 435:7-438:18). Then, between February and April 2011, Mr. Craft received two verbal warnings from Ms. Turner (which were documented) for

[2]It is worth noting that Mr. Craft already had some animosity toward Ms. Turner because he had applied for the supervisory position into which she was recently promoted, and, then, repeatedly (Continued …)

unsatisfactory job performance, and between May and June 2011 he received four written warnings for unsatisfactory job performance. (ALJD 3:4-19; R-2; R-3; R-4; R-5; R-17; Tr. 182:7-184:6; 185:2-189:11; see also Tr. 318:16-322:18; 438:19-439:3).

Harassing, Threatening, and/or Bulling Behavior by Mr. Craft Prior to Demotion

On July 8, 2011, Mr. Craft's then-subordinate, Kim Coleman ("Ms. Coleman"), complained to Ms. McMurrian that Mr. Craft was harassing her at work.[3] Ms. Coleman said, among other things, that Mr. Craft "threatened her and said he was going to MAKE SURE she lost her job if it was the last thing he did" (R-7; Tr. 192:23–195:7). Ms. Coleman testified that when they first started working together in 2003, Mr. Craft had asked her on a date, which she flatly rejected. Ms. Coleman also testified that Mr. Craft made sexual comments about her undergarments, e.g., are you wearing a bra today, and pull your panties out of your butt. Ms. Coleman further testified that Mr. Craft would refer to himself as Long Tongue Lee ("LTL"), and would stick his tongue out to proudly show women the length of it – in an obvious sexual gesture. (ALJD 3:21-4:5; Tr. 336:17-337:17; 340:12-341:7).

Then, on July 10, 2011, another team lead, James Powell, complained to Ms. McMurrian that Mr. Craft was out of control, and that he was threatening and berating his subordinates. At about this time, another subordinate, Uma Jalloh, told Ms. McMurrian

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questioned her qualifications for the job. (Tr. 178:3-7; 181:11-182:6; 433:9-434:2; 435:21-436:3).

[3]Ms. McMurrian testified that there was no HR person at the Memphis facility, so employees came to her with complaints. (Tr. 238:20-22).

that she felt Mr. Craft's behavior constituted harassment Thus, Mr. Craft received a written warning for "threatening and berating" his subordinates, and failing to perform his duties as a team lead. In this connection, upon review of the numerous instances where Mr. Craft failed to properly perform his job duties, the complaints from his subordinates, as well as his own request to return to his prior position, it was determined that Mr. Craft should be returned to his prior position of material handler, effective August 1, 2011. At that time, Mr. Craft was warned that further infractions would result in disciplinary action up to and including termination. (ALJD 4:7-23; R-6; R-7; R-8; Tr. 189:12–198:2; 338:12-340:11; 341:14-342:24; 343:6-11; 438:19-439:11).

Continued Harassing, Threatening and/or Bullying Behavior After Demotion

After Mr. Craft was returned to the material handler position in August 2011, Mr. Craft's job performance suffered and he continued to engage in harassing, bullying and/or threatening behavior – in continued violation of Company policy. (GC-2a, 2c and 2d). Indeed, in late 2011, Kim Coleman (now a co-worker) again lodged an internal complaint about Mr. Craft. In her complaint, Ms. Coleman reported several incidents of being harassed, threatened, and bullied by Mr. Craft. For example, Ms. Coleman complained that in November 2011, in front of team lead, Thelma Halbert, Mr. Craft directed her to "kneel down [in front of him] and apologize to him," after he found an error she had made on the job. Ms. Coleman testified that she was humiliated and offended by this act of sexual harassment. In addition, Ms. Coleman complained that Mr. Craft repeatedly stared at her and obsessed over her job performance – even though he was no longer a team lead. On one occasion, Mr. Craft attempted to discipline Ms.

Coleman and, then, tried to bully and humiliate her further by seeking a security guard to escort her from the building – which, as a co-worker (or even as a team lead), he did not have the authority or grounds to do. Ms. Coleman complained that Mr. Craft would say things like: "Hey, you laugh now, but your day is coming." Further, Ms. Coleman complained that Mr. Craft had placed a recording device near her work station, which she believed was there to record her conversations at work – against Company policy.[4] Ms. Coleman testified tearfully that she feared Mr. Craft. (ALJD 4:25-5:42; R-9; R-16; Tr. 198:11–201:10; 305:17-310:20; 343:12-346:21; 350:6-352:24; 348:4-350:5; 353:11-20; 360:10-361:5; 400:16-401:8).

Upon receipt of Ms. Coleman's complaint, Ms. McMurrian conducted an investigation. During the investigation, several co-workers, including Uma Jalloh and Marliatu Bah, voluntarily reported that they felt threatened and harassed by Mr. Craft. In addition, Thelma Halbert, team lead, testified Ms. Coleman would confide in her and Ms. Coleman was so upset by Mr. Craft's harassment that she would cry about it at work. Employee Len Lee opined to Ms. McMurrian that Mr. Craft had "bad blood" for Ms. Coleman. Employee Latoya Hyde told Ms. McMurrian that Mr. Craft had problems with single women (like Coleman) working on the floor and that he treated them differently. (ALJD 4:25-5:42; R-9 through R-14 and R-16 through R-19; Tr. 198:11-214:9; 342:2-

[4] Ms. McMurrian testified that other employees had complained that in meetings Mr. Craft would use his cell phone and act like he was recording people – in an apparent effort to intimidate or bully others. Ms. McMurrian said she counseled Mr. Craft about this matter. (ALJD 5:1-4; Tr. 305:17-307:3; R-16).

343:5; 434:5-435:6; 453:15-454:2; 458:15-461:13; 477:4-479:4; 482:5-485:24; 486:18-494:7).

Further, Mr. Craft's supervisor, Ms. Turner, reported to Ms. McMurrian that since returning to his prior position, Mr. Craft had repeatedly engaged in disruptive and intimidating behavior, including attempting to "undermine and belittle" her work decisions. Ms. Turner testified emotionally that she feared Mr. Craft. Moreover, several male managers reported that Mr. Craft was interrupting daily pre-shift meetings with religious references, unsolicited singing of nonsensical songs and/or dancing, as well as aggressively blaming others for various matters that might arise during the meetings. (ALJD 5:44-6:23; see also R-11; R-16; R-18; R-19; Tr. 348:4-350:5; 404:11-405:8; 407:24-409:18; 439:4-443:19).

In addition, while the investigation was being conducted, on December 4, 2011, Mr. Craft's job performance failed to meet expectations in that he failed to properly "pick/pack" a customer order, which resulted in a customer complaint. Then, on December 16, 2011, Mr. Craft improperly added new deliveries to a shipment which caused several other employees to spend numerous hours to correct the problem and reissue over 300 customer deliveries. Mr. Craft was interviewed as part of the investigation, but his responses and explanations were found to be less credible than the other employees. (ALJD 6:25-7:4; GC-6; Tr. 80:23-81:11; 216:24-218:3).

Significantly, as a result of the above findings, in mid-January 2012, the Company decided to terminate Mr. Craft's employment finding "it is in the best interest of the Company and employees of Philips to terminate Lee Craft's employment effective

immediately." (ALJD 7:6-42; R-11, page 2; R-12; Tr. 213:16-10; 215:21-216:23). However, upon further review with the Philips Human Resources and Legal Department, Ms. McMurrian decided to give Mr. Craft one last chance. Thus, instead of issuing the previously drafted termination notice (R-12), Mr. Craft was issued a Final Written Warning on January 20, 2012. Further, with his agreement, Mr. Craft was transferred to another area where he would not work near Ms. Coleman and would now report to a male manager, Joe Odum. Significantly, Mr. Craft was specifically instructed to stay away from the harassed employee's (Ms. Coleman) work area. (ALJD 7:6-42; GC-6; Tr. 216:24-221:14; 224:10-16).

In addition, Ms. McMurrian advised Ms. Coleman of the remedial action being taken in response to her complaint. Further, Ms. McMurrian instructed Ms. Coleman to contact her if Mr. Craft engaged in any further acts of harassment, bullying or intimidation. (ALJD 8:10-13; Tr. 226:7-227:4; 354:1-355:8).

Final Harassing, Bullying, Intimidating, and/or Disruptive Behavior

Shortly thereafter, on January 24, 2012, Mr. Craft violated the Final Written Warning, and his manager's directive that he stay away from Ms. Coleman. Indeed, Mr. Craft left his new work area, during work hours, and drove a company vehicle approximately 150 yards to Ms. Coleman's work area, and engaged in further harassment, bullying and intimidation of Ms. Coleman. (ALJD 7:44-8:26; R-13; R-14; Tr. 221:15-224:22; 355:9-360:8; 494:8-499:5).

In response, Ms. Coleman again complained to Ms. McMurrian about Mr. Craft's behavior. The Company conducted an investigation and found that Mr. Craft had bragged

in front of Ms. Coleman that he was "untouchable" and that management had done him a favor by moving him away from Ms. Coleman in response to her complaint. Further, Mr. Craft ranted about Ms. Coleman being to blame for his receiving the Final Warning and implied that he would "get even" with Ms. Coleman. (ALJD 7:44-8:26; R-13, R-14; GC-17; Tr. 224:10-227:9; 355:9-360:8).

Under its own policies (and the law), Philips had an obligation to protect Ms. Coleman and others from a hostile workplace. (GC-2(a)-(d); Tr. 229:2-20). Indeed, the Company's Harassment-Free Workplace Policy provides that:

> A core value of Philips Electronics North America is that all employees…are able to function in a positive, productive environment that respects their dignity as human beings and is free of hostile, abusive, humiliating or intimidating behavior. Both the law and Philips prohibit sexual and protected-status harassment….some examples of prohibited behavior: sexual jokes, comments, stories, pictures, looks or touching, whether or not the persons involved believe the conduct to be offensive; racial, ethnic, sexist, religious, ageist, homophobic or other slurs, jokes or put-downs, again, whether or not someone believes them to be offensive; cursing, obscene language, yelling, ridiculing, humiliating, bullying, "in your face" intimidation, regardless of the circumstances or situation.

(GC-2(c) (emphasis added); see also GC-2(a) at pages 14, 15, 19, 20, 60-62; Tr. 43:24-44:16). The Violence-Free Workplace Policy provides, in relevant part, that: "Workplace violence can take many forms including, but not limited to, the following: Intimidating or threatening behavior or statements[;]…threats of bodily harm [; and] Harassment by any means…." The Policy further provides that: "Violations of this policy are serious and will result in disciplinary action, up to and including termination of employment." (GC-2(d)).

In this regard, if the Company did not take prompt, effective remedial action she would likely have resigned and/or taken legal action against Philips. As Ms. Coleman

and Ms. Turner both testified, they would be compelled to resign if Mr. Craft was returned to work at Philips. (Tr. 360:10-361:5; 444:13-445:24).

Given the above long history of performance and behavioral issues, including threats, harassment, and bullying co-workers and supervisors, e.g., Ms. Turner, the Company decided to terminate Mr. Craft's at will employment relationship, effective January 25, 2012. (ALJD 7:44-8:26; GC-7; Tr. 227:23-230:4; 360:10-361:5; 443:20-445:24).

Ms. McMurrian terminated several other employees at the Memphis facility for the same sort of intimidating, harassing, and/or bullying behavior, including Catha Calhoun; Jessie Pruitt; Sharonda Lewis; and Marliatu Bah. In addition, Ms. McMurrian terminated numerous employees for performance issues alone. (Tr. 230:5-231:24; 311:3-312:10).

ARGUMENT

I. *Wright Line* Governs The Allegations Of Discriminatory Termination

In her decision, the ALJ applied the applicable *Wright Line* analysis in this case. As recently clarified by the Board, the General Counsel must first make a *prima facie* case by showing that "animus toward [the employee's] protected activity was a motivating factor in [an adverse employment] decision" based on the following three factors: (1) The affected employee engaged in protected activity; (2) The employer knew of the activity; and (3) The employer bore animus to the affected employee's protected activity. *Wright Line*, 251 NLRB 1083 (1980); *Praxair Dist., Inc.*, 357 NLRB No. 91, slip op. at *1 n.2 (Sept. 21, 2011). If the General Counsel establishes a *prima facie* case, the employer must then prove that a "legitimate business reason" motivated the action or

otherwise demonstrate that the same action would have occurred even in the absence of the protected conduct. *Id.* at 1088. If the employer makes that showing, the burden shifts back to the General Counsel to "show that Respondent's defense is pretextual." *Jordan Marsh Stores Corp.*, 317 NLRB 460, 476 (1995).

II. The ALJ's Credibility Findings are Consistent with the Record Evidence and Should Not Be Overturned (General Counsel exceptions 1 and 2)[5]

As General Counsel properly concedes in his brief, it is well established that the Board should not overturn the credibility findings of an ALJ, especially where, as here, the credibility findings are based on the ALJ's assessment of the demeanor of the witnesses. (See General Counsel's Brief ("GCB") at pg. 22 *citing Standard Dry Wall Products. Inc.*, 91 NLRB 544 (1950) *enf'd* 188 F.2d 362 (C.A. 3 1951). In this matter, the ALJ specifically stated that she based her decision "[o]n the entire record, including [her] observation of the demeanor of the witnesses…." (See ALJD at page 1). In this regard, the ALJ credited the testimony of Respondent's key witnesses, Sherry McMurrian (decision-maker), Kim Coleman (harassed by Mr. Craft), Thelma Halbert (witness to harassment) and Rolita Turner (supervisor who felt threatened) based on their demeanor on the stand as well as the supporting record evidence. In this regard, the ALJ was able to see that at least two witnesses, Ms. Coleman and Ms. Turner, became very emotional during their testimony; and the ALJ could determine for herself that their tears and fear of Mr. Craft were genuine. (Tr. 360:10-361:5; 400:16-401:8; 439:4-441:2; 443:20-445:24). Whereas, the ALJ could also see that Mr. Craft's demeanor and testimony was essentially a scripted, unemotional, blanket denial of any wrongdoing. ((Tr. 104:19-107:5).

The Board should not overrule the ALJ's credibility determinations as the clear preponderance of all the relevant evidence does not suggest the ALJ erred in such

[5]In its Brief, General Counsel does not seem to specify where he argues in support of exceptions 3-8. Thus, they should not be considered. Nevertheless, if considered, such exceptions are baseless and should be rejected.

determinations. *See Lane Constr. Corp.*, 138 NLRB 1118, 1118-19 (1962) (general statement that "the facts and by my observations of the demeanor of the witnesses" suggested no Act violation "must be construed as meaning that the Trial Examiner had discredited in material respects on both facts and demeanor the only testimony on which a violation of the Act could be based"); *see also Gerson Elec. Constr. Co.*, 259 NLRB at 640 n.1 (1981) (finding ALJ based credibility determinations on witness demeanor when ALJ generally stated that he based his findings upon his "observation of witness demeanor").

In his brief, General Counsel contends that "the testimony of McMurrian is not supported by the relevant evidence presented at the hearing." (GCB at 22). This contention is baseless. In fact, the testimony of Ms. McMurrian was largely taken directly from, and/or supported by, the numerous documents that she had created during the relevant time period and which were accepted into evidence by the ALJ. That is, while Ms. McMurrian was testifying she generally had a document in front of her and counsel for Respondent questioned her about the document, and/or had her read the contents of the document into the record. (See Tr. 178:8-230:4; R-1 through R-14; GC-7). Likewise, the testimony of Respondent's other witnesses was also based largely on documentary evidence – as they too reviewed, and/or read directly from, documents while testifying. (See Tr. 334-361; 431-446). Whereas, there was little, if any, documentary evidence to support the testimony of Mr. Craft. (See Tr. 45-120). In sum, upon an accurate review of the record, the Board should flatly reject General Counsel's totally unfounded contentions with respect to the testimony of Respondent's witnesses – especially Ms. McMurrian.

In his brief, General Counsel also contends that the ALJ failed to consider the testimony of Lexie Campbell and Sherry Grey, both of whom were never employed by Respondent. (GCB at 22-23). Again, General Counsel's contention is baseless. Indeed, according to General Counsel, their testimony supported his "new" argument that Mr. Craft also engaged in protected activity during pre-shift meetings "moment to shine." As Respondent argued in its Post Hearing Brief, this "new" argument should not be considered, because the Complaint does not make such

an allegation; General Counsel did not make that argument in his opening or during the hearing; and General Counsel did not seek to amend the Complaint. (GC-1(e); Tr. 16:5-14). In fact, the Complaint (and Charge) makes no reference whatsoever to such pre-shift meetings, but, rather, only alleges that the protected concerted activity was when: "Lee Craft showed and discussed with his coworkers an employee counseling form he received from Respondent on about January 20, 2012." (See GC-1(e), 1(a) and 1(c)). Given this, General Counsel should be barred from making such an argument (or any argument not made in the Complaint). Otherwise, the Company's "due process" rights would be violated. *See International Baking & Earthgrains,* 348 NLRB No. 76, at *3 (2006) ("Due process requires that a party be on notice of the General Counsel's contentions"). "[T]o decide the case on a theory neither raised nor litigated – would deny the parties due process of law." *United Mine Workers of Am.*, 338 NLRB 406, 406 (2002); *see also N.L.R.B. v. Pepsi-Cola*, 613 F.2d 267, 274 (10th Cir. 1980) ("Simply because violations could have been alleged in addition to those in the complaint does not obligate the employer to defend against all possibilities"). "[T]he crucial focus is at all times on whether notice was given which provided the party with an adequate opportunity to prepare and present its evidence." *N.L.R.B. v. Quality C.A.T.V., Inc.*, 824 F.2d 542, 546 (7th Cir. 1987); s*ee also Bob's Casing Crews, Inc. v. N.L.R.B.*, 429 F.2d 261, 263 (5th Cir. 1970). Thus, the Board must reject General Counsel's last minute attempt to add new allegations to the Complaint. (See GCB at pages 22-23; 33-35).

However, even if such allegations/argument are allowed, a review of the testimony of these witness does not support the argument. Indeed, Mr. Campbell testified that Mr. Craft's comments during the moment to shine were simply motivational and never "critical of his managers or supervisors" or Philips. (Tr. 34:1-35:23). Further, on cross-examination, Mr. Campbell testified that, at times, Mr. Craft talked about non-work subjects like religion. As to Ms. Gray, her testimony actually supports Respondent's position in that she testified that Ms. Coleman told her that Mr. Craft was harassing her at work. (Tr. 159:9-22). In any event, Ms. Gray only testified that during the moment to shine Mr. Craft would say things to make people

"smile and cheer up." (Tr. 162:12-163:16). Ms. Gray did not testify about anything that would be considered alleged protected, concerted activity – and General Counsel doesn't even seem to make that argument.

As to Mr. Barkus, General Counsel contends that the ALJ should have considered Mr. Barkus' testimony where he denied that he witnessed Mr. Craft return to the ballast area and harass Ms. Coleman. (GCB pg. 23). However, on cross-examination, such testimony was shown to be irrelevant as Mr. Barkus admitted that his shift started 4 hours after Mr. Craft's shift and he was late a number of times – which ultimately resulted in his employer ending his assignment at Philips. (Tr. 150:5-151:15). Actually, the only relevant evidence as to Mr. Barkus was Ms. McMurrian's investigative memo which states that Mr. Barkus said: "something is wrong with that man [Mr. Craft]; I used to work with him somewhere else and he was a problem then and he is still a problem." (R-14).

In the end, the testimony of Messrs. Campbell and Barkus, as well as Ms. Gray was generally irrelevant and, accordingly, did not warrant mention in the ALJ's decision. Regardless, the ALJ's failure to discuss their testimony certainly does not provide a basis to overturn the credibility findings of the ALJ.

III. The ALJ properly found that Philips Did Not Maintain a Rule Prohibiting Employees From Discussing Discipline with Other Employees (General Counsel Exception 9)

In his brief, despite the ALJ's thorough discussion of this issue; the lack of any credible record evidence to support his argument and the overwhelming evidence to the contrary, General Counsel still contends that Philips has a rule that discipline is confidential and employees are not allowed to share and/or discuss their discipline with their coworkers. (ALJD 9:40-11:19; GCB 24-25). Indeed, in a last ditch effort to salvage this baseless allegation, General Counsel disregards the Complaint and makes a lengthy and convoluted argument based on Respondent's

investigative memo and the termination notice, both dated January 25, 2012. (GCB at 24-30; R-14; GC-7). Indeed, contrary to the clear and unambiguous language in the Complaint, General Counsel contends that the ALJ "misstates" both the allegation and his position on this issue. That is, the Complaint provides that: "Since January 19, 2012, Respondent has maintained a rule that discipline is confidential and prohibiting employees from sharing and/or discussing their discipline with their coworkers." (GC-1(e) at paragraph 4) (emphasis added). However, despite what the Complaint clearly alleges, General Counsel now argues that Respondent maintained this rule before January 19, 2012. Once again, General Counsel should not be permitted to change the allegations against the Company. *See International Baking & Earthgrains*, 348 NLRB No. 76, at *3 (2006); *United Mine Workers of Am.*, 338 NLRB 406, 406 (2002); *see also N.L.R.B. v. Pepsi-Cola*, 613 F.2d 267, 274 (10th Cir. 1980).

In any event, the ALJ properly found that the credible record evidence, including Mr. Craft's own hearing testimony and sworn statement to the NLRB, dated November 26, 2012, Philips did not maintain such a policy before or after January 19, 2012. (ALJD 9:40-11:19; Tr. 126:21-128:5; see also Tr. 171:6-174:7). In this connection, despite interviewing numerous Philips employees during the Board's investigation, at hearing, General Counsel did not produce a single witness to say there was, or even that they believed there was, such a Philips policy. Clearly, General Counsel cannot be allowed to create a rule based on his interpretation of an investigative memo and a termination notice – neither of which were circulated amongst the employees. Given this, the Board should uphold the ALJ's decision as to this allegation.

IV. The ALJ properly found that Philips' Decision to Terminate Mr. Craft Was Motivated By Legitimate Business Reasons (General Counsel Exceptions 10-18).

The ALJ properly found that Philips established that legitimate business reasons motivated its decision to terminate Craft. (ALJD 13:15-15:39). Indeed, as the ALJ properly recognized, the undisputed hearing evidence showed that management had decided to terminate before he engaged in the alleged protected activity. That is, upon completing its investigation of Ms. Coleman's December 2011 complaint, management decided to terminate Mr. Craft's employment based on his harassment, intimidation, and/or bullying of his co-workers – especially, Ms. Coleman. Indeed, the investigative memorandum dated January 16, 2012, created by Ms. McMurrian provides: "It is in the best interest of the company and the employees of Philips to terminate Lee Craft's employment, effective immediately." (R-11; R-12; Tr. 213:16-10; 215:21-216:23). However, as the ALJ recognized, upon further review, Ms. McMurrian decided to give Mr. Craft one last chance and instead of issuing the previously drafted termination notice, Mr. Craft was issued a Final Written Warning on January 20, 2012. (GC-6; Tr. 216:24-221:14; 224:10-16). Given this, as the ALJ properly found, the Company already decided to terminate Mr. Craft even before (or in the absence of) the alleged protected activity. (ALJD 13:15-15:39).

Ultimately, the ALJ correctly found that the final decision to terminate Mr. Craft, made several days later, was based on essentially the same reasons as the prior decision to terminate – with the final act of harassment/intimidation/bullying and disruptive behavior occurring on January 24, 2012 when Mr. Craft left his new work area during

work time and drove a company vehicle approximately 150 yards to continue the harassment of Ms. Coleman -- whom he had been moved away from based on prior harassment and instructed not to contact. The credible evidence established that on that day, in front of Ms. Coleman, Mr. Craft bragged that he was "untouchable" and that management had done him a favor by moving him to another area as a result of Ms. Coleman's complaint. Most important, Mr. Craft ranted that Ms. Coleman was to blame for his receiving the Final Written Warning and that Ms. Coleman, and her female managers, were powerless. In addition, Ms. Coleman reasonably believed Mr. Craft would "get even" with her, which included his previously stated goal of getting Ms. Coleman fired by the Company. (R-13, R-14; GC-17; Tr. 224:10-227:9; 355:9-360:8). Under its own policies (and the law), Philips had an obligation to protect Ms. Coleman and others from a hostile workplace. (GC-2(a)-(d); Tr. 229:2-20). In sum, the ALJ properly found, as she stated, that based: "[o]n the entire record, including [her] observation of the demeanor of the witnesses….that Respondent has demonstrated that it would have terminated Craft in the absence of any protected activity." (ALJD 1:13-15; 13:15-16:4).

In an apparent effort to obfuscate matters, General Counsel argues that the conduct for which Mr. Craft was terminated did not actually occur on January 24, 2012, but instead on January 20. To support his argument, General Counsel points to the testimony of Ms. Coleman and Ms. Halbert and incorrectly claims that "[b]oth Coleman and Halbert testified that Craft made the comments about his warning notice in the Ballast area on the same date he received the January 20 final warning." (GCB at 31). That is simply not true. Indeed, Ms. Coleman testified that Mr. Craft came back to her area at

some point after he had been moved and indicated that he had been doing the "new" job for some time – e.g., Mr. Craft said: "He don't have to pick up these heavy ballasts no more like we do." (Tr. 354:19-355:23). Ms. Halbert also testified that Mr. Craft came over to Ms. Coleman's area after he was transferred. (Tr. 494:8-496:6). Further, General Counsel's own questions to Mr. Craft refer to him showing the final warning after January 20th. That is, General Counsel asked Mr. Craft: "Q. "…on those days after January 20th, did you show this January 20th warning notice to any other employees? A. Yes." (Tr. 92:7-95:16). The only possible basis for General Counsel's argument is where Ms. Coleman testified that "…I'm assuming he had got a – he had got a wrote-up this particular day." (Tr. 354:19-355:23). Obviously, Ms. Coleman's assumption does not establish that Mr. Craft's continued harassment of her occurred on the date he received the final notice – especially since Ms. McMurrian's uncontroverted testimony and the documentary evidence shows that the continued harassment occurred on January 24, 2012. (R-14; GC-7; Tr. 224:10-227:9). In any event, even if the continued harassment happened on January 20, which it did not, that is irrelevant – as the credible evidence established that the harassment did, in fact, occur as Respondent's witnesses testified.[6]

[6] General Counsel makes some other "factual" arguments which are irrelevant. For example, General Counsel points out that the ALJ found that Mr. Craft was transferred to an "entirely different building," but the evidence shows there was only a wall separating the two sections of the same building. (GCB at 15; ALJD at 7). General Counsel may be correct here, but it is of no consequence as the relevant fact is that he was moved to another area of the large warehouse on the other side of a wall approximately 150 yards away and instructed to stay away from Ms. Coleman – which he failed to do.

(Id.). Thus, General Counsel's confused argument should be rejected and the ALJ's decision upheld.

Finally, General Counsel attempts to argue that the ALJ erred in finding that Respondent had an "honest belief" that Mr. Craft engaged in the conduct; and that General Counsel failed to show Mr. Craft did not engage in the conduct. (ALJD 15:16:4; GCB 41-43). This too is nonsense. Indeed, the only evidence that General Counsel presented to counter Respondent's "honest belief" that Mr. Craft engaged in the subject conduct was Mr. Craft's scripted denial. (Tr. 104:19-107:5). Whereas, as shown herein, Respondent presented several credible witnesses and numerous supportive documents to establish its "honest belief" that Mr. Craft engaged in the behavior for which he was ultimately terminated. (R-14; GC-6, 7; Tr. 227:23-230:4; 360:10-361:5; 443:20-445:24).

V. Conclusion

For the foregoing reasons, Respondent respectfully requests that the Board adopt the ALJ's decision in its entirety.

DATED this 27th day of August 2013.

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CERTIFICATION OF FILING AND SERVICE

I hereby certify that in accordance with the NLRB's rules pertaining to electronic filings and NLRB Rule 102.114(i), a true and correct copy of the foregoing Brief was timely filed via the NLRB E-filing system, and was served on the following on the date below by undersigned counsel for Respondent via electronic mail on Counsel for the Acting General Counsel at: William.Hearne@NLRB.gov and upon complainant Lee Craft at: craftphyllis@ymail.com

DATED this 27th day of August 2013.

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